No. 92-1920

Supreme Court, U.S.
FILED
MAR 15 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KAREN LIVADAS,

Petitioner,

—v.—

LLOYD AUBRY, CALIFORNIA LABOR COMMISSIONER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EMPLOYERS GROUP, ALLIANCE OF MOTION PICTURE & TELEVISION PRODUCERS, CAPITAL CITIES/ABC, INC., CBS INC., NATIONAL BROADCASTING COMPANY, INC. AND CALIFORNIA ASSOCIATION OF EMPLOYERS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*

The interests implicated by this case far transcend whether union-represented employees in California can pursue late wage payment penalties through the offices of the Labor Commissioner. Labor standards in at least 17 other States and the District of Columbia provide collective bargaining exceptions whose validity have now been called into question.

Amici, who submit this brief pursuant to the written consent of the parties lodged with the Clerk on February 18, 1994, are employer organizations and individual employers with significant connections to California. They represent a cross-section of employers, both in size and by industry, which have longstanding collective bargaining relationships. Many of these employers also operate in states other than California which provide similar collective bargaining exceptions to their own labor standards.

The Employers Group, formerly known as the Merchants & Manufacturers Association, is the largest association of California employers with over 5,000 employer members which employ an aggregate of more than 2,500,000 California employees.

The Alliance of Motion Picture & Television Producers is the employer association which acts on behalf of the major motion picture studios and numerous independent motion picture production companies with respect to collective bargaining and other labor relations activities.

Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Company, Inc. are national television networks with substantial operations in California and throughout the nation.

The California Association of Employers is an association of approximately 800 small and medium-size California employers which participates in collective bargaining on behalf of its members.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[T]he interest in protecting individuals against exploitation must often be balanced against the value of allowing individuals to order their own affairs. This balance is often struck by conferring rights upon individuals, and then allowing those individuals to make the choice whether they would rather retain, or give up for something else, the right so granted. . . . The 'express contract' exclusion in the Maine Statute does not burden the collective bargaining process . . . [B]y allowing employers and employees to construct a form of protection different from that prescribed by the state, the Statute functions in much the same way as the 'backdrop of state law' against which collective bargaining occurs; viz, the Statute confers certain rights upon one party to the federal bargaining process -- in this instance, employees rather than employers -- but then allows the employer and the union to go forward with only the constraint that any waiver of the state-conferred rights must be express and intentional. . . . [T]his is how the federal bargaining process interacts with such state-conferred rights as the employers' right to manage its property (and with the individual rights conferred by the NLRA itself. (*see, e.g., Metropolitan Edison Co. v. N.L.R.B.*, 460 U.S. 693 (1983))."

Surprisingly, the author of this statement is Livadas' supporting *amicus*, the AFL-CIO, speaking through the same attorneys who successfully argued this position to the Court in *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 21-22 (1987).[1] In just a few years, there has been a dramatic change. State "hands off" policies not reasonably distinguishable from those extolled by the AFL-CIO in *Fort Halifax* are now excoriated as "blatant" "anti-union

[1] *See* Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Appellees, submitted in *Fort Halifax Packing Co. v. Coyne*, No. 86-341, pp. 28-30.

discrimination." The attack is not only made by Livadas and the AFL-CIO, but even more surprisingly, also by the United States.

This, indeed, is a strange case, both procedurally and substantively. Extremely significant economic interests of unionized employers throughout the country have been placed into jeopardy by virtue of Livadas' legal challenge to collective bargaining agreement ("CBA") exceptions contained in a large number of State labor laws. Yet, no employer is party to this litigation. The burden of defending the validity of collective bargaining exceptions to State labor regulatory provisions, upon which the employers justifiably have relied, has fallen on the shoulders of a State official whose primary day-to-day activities entails the enforcement of State laws against employers. Ironically, while the State official argues that federal labor policy favors collective bargaining and does not invalidate the many exceptions to State labor regulations that have the purpose of giving full effect to the collective bargaining process,[2] Livadas and the United States -- and to a slightly lesser extent, the AFL-CIO -- argue for a ruling which, if adopted, could severely constrict the scope of collective bargaining.

The essential question in this case is whether California law, as interpreted and applied by the Labor Commissioner, improperly interferes with the federal statutory rights of union-represented employees. The issue is *not* whether the Labor Commissioner correctly interpreted California law -- an issue which cannot

[2] Livadas claims that the Labor Commissioner made a relevant concession of law. [Livadas Brief, p. 10.] *Amici* do not agree with this assessment as a matter of fact and, furthermore, do not believe that any such concession could have the legal effect Livadas seems to urge. (We also note that the alleged concession was in response to an inaccurate statement of labor law presented by the Solicitor General and the Acting General Counsel of the NLRB, *see* pp. 7-12 below.) The mere possibility that employer interests in this case could in any way be impacted by a purported concession by the Labor Commissioner only underscores our concerns about the unusual nature of this case.

appropriately be determined in this type of federal proceeding -- or whether the Labor Commissioner's long-standing "hands off" posture is mandated by federal Section 301 preemption doctrine -- a secondary argument suggested by the Labor Commissioner which the Ninth Circuit did not need to reach, and did not decide.

Without even addressing the fact that State collective bargaining exceptions reflect the legally-presumed strength and prestige of labor organizations, Livadas and her *amici* assert that there has been "discrimination." Nowhere in their briefs can one find any explanation as to *why* or *how* differential treatment in according union-represented employees the right to make their own choices interferes with their rights under the National Labor Relations Act ("NLRA"). And no legal authorities are cited to support the contention that "disparate treatment" between union-represented and non-represented employees in the granting of economic benefits -- by either an employer or the State -- unlawfully interferes with the exercise of employee NLRA Section 7 rights.

The briefs filed by Livadas and her supporters fail to disclose that during the past 50 years, unbroken lines of decisions of the National Labor Relations Board ("NLRB") and at least six Circuits have *rejected* the very position they so strenuously urge. No less than 30 cases have held that employers may engage in "disparate treatment" by unilaterally granting economic benefits to non-represented employees which union-represented groups are required to seek through bargaining. The contention that analogous differential treatment by the State violates the NLRA stands on even weaker legal footing.

Furthermore, the NLRA itself allows for a functionally identical standard for differentiating between union-represented and non-represented employees. Many fundamental individual rights under the NLRA may be "waived" by bargaining representatives, but not by individual, non-represented employees. This also is true of a number of other federal statutes. Given this analogous "disparate

treatment" authorized by the NLRA and the other federal statutes, there is no basis for Livadas and her *amici* to argue, or the Court to conclude, that the NLRA implicitly prohibits the States from allowing or requiring employers and unions -- but not employers and individual employees -- to negotiate with respect to State labor standards.

ARGUMENT

Livadas' and her supporting *amicus* briefs address at length a non-issue in this case -- whether the California "hands off" policy giving rise to this suit was *required* by federal preemption doctrine. Instead, the issue in this case *is* whether the "hands off" policy *contravenes* federal law.[3]

Livadas and the United States correctly state that the Labor Commissioner's *interpretation* of California law is subject to challenge irrespective of the fact that they apparently concede that the interpreted statute is valid on its face. The critical issue, however, as Livadas herself acknowledges, is whether that interpretation of State law -- or "misinterpretation" as she would prefer to characterize it -- "*cause[d] a deprivation of federal rights.*" [Livadas Brief, p. 33.]

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[3] The California Labor Code Section 229 "hands off" policy giving rise to this suit is mandated as a matter of State law irrespective of what limitations federal law might additionally supply. *Plumbing, Heating etc. Council v. Howard*, 53 Cal.App.3d 828, 833-34 n. 1, 126 Cal.Rptr. 406 (1975). Livadas and her supporters argue that the Labor Commissioner has discriminatorily denied her "prosecutorial services." This is not precisely accurate. The "hands off" policy, as the Labor Commissioner demonstrates, is based upon a judgment that claims, such as Livadas', are invalid and/or unenforceable as a matter of California law. The result in this case is the same whether the "minimum labor standard" at issue is Section 229 (as the Labor Commissioner contends) or Labor Code Section 201 and/or 203 (as Livadas contends). Regardless, *amici* dispute that any of these provisions is truly a "minimum labor standard."

For purposes of this case, it is entirely irrelevant whether the Labor Commissioner correctly interpreted California law.[4]

Although the district court decision and Ninth Circuit dissent relied on the "*Machinists* preemption doctrine," the AFL-CIO opines, the United States essentially acknowledges and even Livadas now suggests that *Machinists* principles are not implicated by this case. [AFL-CIO Brief, p. 26; United States Brief, p. 15 n. 4; Livadas Brief, p. 13.] The approach which comes closest to properly focusing the argument is to ask whether it is an unlawful direct infringement of NLRA Section 7 rights for the States to extend labor standards to non-union-represented employees, but not to represented employees who work under CBAs with grievance and arbitration procedures.[5] [*See* United States Brief, pp. 13-15.]

A more accurate way of looking at the same issue, however, is to ask whether it is unlawful for the States to permit employers and unions to reach contract terms varying otherwise applicable labor regulatory standards, while denying the same negotiating flexibility to employers and their non-represented employees.

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[4] Although the Court is not called upon to determine whether the Labor Commissioner's interpretation of California law is correct, *amici* note a prior California judicial decision to similar effect. *See Hagin v. Pacific Gas & Electric Co.*, 152 Cal.App.2d 93, 98, 312 P.2d 356 (1957) (suit for penalty under § 203 barred because it was dependent on interpretation of CBA with arbitration clause).

[5] As the Court explained again just last term, *Machinists* deals with situations where the States attempt to regulate in areas which federal labor policy has mandated be left unregulated by both state and federal regulators. *Building & Construction Trades Council v. Associated Builders and Contractors*, 113 S.Ct. 1190, 1195 (1993). In this case Livadas complains about California's non-regulation in an area which she claims it should be regulating. In any event, the "*Machinists*" theory adds nothing to the analysis because Livadas relies entirely on the notion that the State's interpretation of State law unlawfully infringed upon her Section 7 rights. [*See also* p. 12 n. 16 below.]

The answers to these questions are easy. There is *no* federal restriction on the power of the States to remit labor standards issues to the collective bargaining process. The denial of negotiating flexibility to non-union-represented employees and their employers cannot be turned into claims of anti-union discrimination.

I. 50 YEARS OF NLRA PRECEDENT ESTABLISHES THAT IT IS LAWFUL TO GRANT ECONOMIC BENEFITS ONLY TO NON-UNION-REPRESENTED EMPLOYEES

A most surprising aspect of this case is the *totally unsubstantiated* nature of Livadas and her supporters' crucial, often-repeated assertion that it is unlawful discrimination under the NLRA to extend economic benefits to non-represented employees, but to withhold those benefits from their union-represented colleagues. Livadas and her supporters cite more than 150 cases in their briefs, *none of which is even claimed to support this assertion.*[6] A straightforward legal analysis establishes that just the opposite is true.

A. At Least 30 Cases Have Held That Employer Differentiation Between Union-Represented and Non-Represented Employees Does Not Interfere With NLRA § 7 Rights

The linchpin of the preemption attack in this case is *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), a case prominently cited by Livadas and her *amici*. The critical factor in *Nash* for finding State action to constitute a direct interference with employee NLRA Section 7 rights was that analogous employer

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[6] The dissenting opinion in the Ninth Circuit, which is frequently quoted by Livadas and her supporters, similarly cited *no* basis for the conclusion that "[t]reated employees who are covered by a CBA in a different -- and less favorable -- manner than all other employees is clearly discrimination based on an exercise of protected federal rights." [Pet.App. 17a.] The district court's conclusion similarly lacked analysis to support this key proposition.

conduct unquestionably would have been proscribed by Section 8 of the NLRA, 29 U.S.C. § 158.[7] *Id.* at 238-39. Given this precedent and the otherwise clearly logical connection, we would have assumed that Livadas and her supporters would have focused on the extensive Section 8(a)(1) and (3) jurisprudence governing employer interference with employee Section 7 rights and employer discrimination affecting union activities.[8] Their briefs, however, are totally silent.[9]

As collected in Addendum A, at least 30 Court of Appeals and NLRB decisions have focused on this highly germane issue. These decisions uniformly have held that the infringements upon the exercise of Section 7 rights which result when an employer discriminates in the granting of economic benefits between union *members* and *non-members*, or between *strikers* and *non-strikers*, simply do not exist when an employer differentiates between bargaining units, including differentiation between a group of *union-*

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[7] *Nash* focused on Section 8(a)(4), 29 U.S.C. § 158 (a)(4).

[8] Section 8(a)(1) is a general provision which prohibits an employer to "interfere with, restrain, or coerce employees in the exercise" of their § 7 rights. Section 8(a)(3) prohibits "discrimination . . . to encourage or discourage membership in any labor organization." "[I]t also makes unlawful discrimination against employees who participate in concerted activities protected by § 7. . ." *Metropolitan Edison Co. v. N.L.R.B., supra*, 460 U.S. at 703.

[9] The United States, at least momentarily, addressed the relevant issue in its *Certiorari* Petition Brief, p. 10, when it declared that there was "no doubt" that an "employer could not deny an employee a benefit to which she was otherwise entitled simply because she was covered by a collective bargaining agreement. A state cannot do so either." This reference to analogous employer conduct was not mentioned in the subsequently-filed United States Brief.

represented employees and an *unrepresented* work force.[10] This is true whether the union-represented employees are working under an existing CBA, between agreements, or indeed, if the union and employer have yet to enter into their first CBA.

The most comprehensive legal analysis of this issue is contained in *Meredith Corp.*, 194 NLRB 588, 590-92 (1971). In that case, the Board held that an employer did not violate Section 8(a)(1) or (3) by paying non-union-represented employees for work time lost due to a storm closure, but refusing to grant similar benefits to represented employees working under a current CBA. Citing significant prior precedent and *dicta* from cases finding separate types of violations, the Board held that "[w]hile differentiation among employees 'based on "membership" in a union' is a *per se* violation of Section 8(a)(3), 'differentiation . . . based on membership in a unit' may be entirely legal." 194 NLRB at 591.[11]

In so ruling, the Board in *Meredith* found prior decisions of the Court to be readily distinguishable, including: *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), which held that an employer violated Section 8(a)(1) and (3), irrespective of the lack of showing of anti-union animus, when it refused to pay striking employees

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[10] Aside from these 30 cases which hold the employers may grant or maintain disparate benefits, there are innumerable cases reflecting that employers may advise their employees that this is a potential consequence of collective bargaining. *See e.g., Shaw's Supermarkets, Inc. v. N.L.R.B.*, 884 F.2d 34 (1st Cir. 1989) (collecting cases); *N.L.R.B. v. TRW-Semiconductors, Inc.*, 385 F.2d 753, 759 (9th Cir. 1967). Indeed, Livadas so acknowledges. *See Clark Equipment Co.*, 278 NLRB 498, 499-500 (1986), cited in Livadas Brief, p. 14 n. 5.

[11] The differentiation may be unlawful only if there is actual proof of anti-union motivation. It is also possible that there could be distinct legal violations related to the differential treatment such as a refusal to bargain in good faith or the leaving of the impression that there would not be bargaining at all.

accrued vacation benefits which it provided to non-strikers; and *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 45-48 (1954), which held that an employer violated those provisions when it differentiated between union *members* and *non-members* within the same unit in the granting of retroactive wage increases and vacation payments.[12]

A leading court decision on this issue is *Intermountain Equipment Co. v. N.L.R.B.*, 239 F.2d 480 (9th Cir. 1956), where during the life of a CBA, an employer denied union-represented employees sick leave and bonuses it extended to its non-represented work force. The Ninth Circuit distinguished *Radio Officers'* on the grounds that the union-represented employees "had obtained substantial benefits which had not accrued to the non-union employees who were not covered by the contract, and the non-union employees who received the benefits denied union members were outside the scope of the bargaining unit." *Id.* at 482.[13]

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[12] The rule of law determined in *Meredith* has been the NLRB's unwavering rule from at least 1948, *see Shell Oil Co.*, 77 NLRB 1306, 1309-10 (1948) (wage increases), through its most recent reaffirmation in 1990, *see KEZI, Inc.* 300 NLRB 594, 595 (1990) (401(k) plan). Other particularly significant NLRB decisions include *Speidel Corp.*, 120 NLRB 733, 734-38 (1958) (Easter bonuses); *B.F. Goodrich Co.*, 195 NLRB 914, 915 (1972) (profit-sharing benefits); *Empire Pacific Industries, Inc.*, 257 NLRB 1425, 1426 (1981) (cost-of-living wage increases); and *Dallas Morning News*, 285 NLRB 807, 808 (1987) (sick pay benefits).

[13] Other relevant court decisions include: *N.L.R.B. v. Appalachian Electric Power Co.*, 140 F.2d 217, 219 (4th Cir. 1944) (withholding of wage increases); *N.L.R.B. v. Nash-Finch Co.*, 211 F.2d 622, 625-27 (8th Cir. 1954) (discontinued bonuses and insurance benefits); *Firestone Synthetic Fibers Co. v. N.L.R.B.*, 374 F.2d 211, 216-17 (4th Cir. 1967) (non-provided medical and pension plans); *Chevron Oil Co., Standard Oil Co. of Texas v. N.L.R.B.*, 442 F.2d 1067, 1074 (5th Cir. 1971) (withholding of wage increases); *Omaha Typographical Union No. 190 v. N.L.R.B.*, 545 F.2d 1138, 1143-44 (8th Cir. 1976) (not given bonuses); *South Shore Hospital v. N.L.R.B.*, 630 F.2d 40, 45 (1st Cir. 1980), *cert. denied*, 450 U.S. 965 (continued...)

This 50-year line of NLRA cases upon which *amici* rely is explainable either on the ground that (i) differentiation between *represented* and *non-represented* employees has *no* adverse effect on employee rights or (ii) the employer desire to subject employee benefit issues to the bargaining process is a "legitimate and substantial business justification."[14]

The underlying premise advanced by Livadas and her *amici* is not just wrong. It also has absurd ramifications. NLRA discrimination is a two-way street.[15] If union-represented employees

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[13](...continued)
(1981) (withholding of wage increases); *and N.L.R.B. v. Henry Vogt Machine Co.*, 718 F.2d 802, 809 (6th Cir. 1983) (terminated cafeteria privileges).

[14] Under the NLRA, where employer conduct is not "inherently destructive" of Section 7 rights, but rather the effect is "comparatively slight," "an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." *Great Dane, supra*, 388 U.S. at 34 (emphasis in original). *See also Metropolitan Edison Co., supra*, 460 U.S. at 701; *Amoco Oil Co.*, 285 NLRB 918, 920 (1987) (defining nature of conduct which is "inherently destructive" of employee rights). This test obviously presupposes that there has been at least *some* effect on Section 7 rights. An employer bears no burden under *Great Dane* until the NLRB General Counsel has met a "prima facie burden of proving at least some adverse effect of the benefit denial on employee rights." *Texaco, Inc.*, 285 NLRB 241, 245 (1987); *Amoco Oil Co., supra*, 285 NLRB at 919. The *Great Dane* framework is applicable to claims under both Section 8(a)(1) and (3) *See Texaco, supra*, 285 NLRB at 245 n. 20.

[15] *See e.g. Radio Officers' Union v. N.L.R.B., supra*, 347 U.S. 17, 45-48 (illegal discrimination against non-union-members where employer paid union-members more favorably); *Pattern Makers' League v. N.L.R.B.*, 473 U.S. 95, 100-101 (1985) (bargaining unit employees have a Section 7 right to refrain from union-activities, including strikes); *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 436-37 (1989) ("NLRA protect[s] an employee's right to choose not to strike").

can successfully complain that employers are precluded from granting non-represented employees more favorable economic benefits, the obverse proposition would be equally indisputable: *An employer would not be permitted to grant union-represented employees more favorable economic benefits in collective bargaining unless it automatically extended the same benefits to its non-represented work force*. Livadas and her *amici* cannot possibly be advocating this result.

B. The States Have Even Greater Latitude than Employers to Draw the Types of Distinctions Which Underlie Regulatory "Hands Off" Policies

If, as established, an employer does not unlawfully interfere with employee Section 7 rights by differentiating between union-represented and non-represented employees, there is no conceivable argument that similar State legislative classifications are unlawful.[16]

To the contrary, States may lawfully make distinctions in this area even where comparable differential treatment by employers might be violative of the NLRA. *See Lyng v. International Union, United Automobile etc. Workers*, 485 U.S. 360 (1988) (federal denial

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[16] Given the extensive, relevant Section 8 jurisprudence with respect to employer and union interference with Section 7 rights, see *Nash v. Florida Industrial Commission, supra*, 389 U.S. at 238-39 & pp. 7-8 above, it would be particularly inappropriate to formulate new restrictive rules to be imposed upon the States based on the unions' newly-proposed, vague concept as to whether "the state law burdens the operation of the federal scheme taken as a whole." AFL-CIO Brief, p.27. *See also Building & Construction Trades Council, supra* 113 S.Ct. at 1198 (Court would not infer NLRA restriction on State conduct "where analogous private conduct would be permitted"); *Karahalios v. National Federation of Federal Employees Local 1263*, 489 U.S. 527, 533 (1989) (it is an 'elemental canon' of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies). The main issue here, as Livadas and the United States point out, is whether the State has interfered with Section 7 rights.

of food stamps to strikers' households violates neither First Amendment nor Equal Protection principles even though statute "works at least some discrimination against strikers and their households"). One reason for so concluding is that the State's actions do not even potentially implicitly convey anti-union retaliation or sentiment in the way that analogous employer conduct might.

A clear purpose of State collective bargaining exceptions to "minimum labor standards" -- if any need be demonstrated -- is the wholly legitimate one of encouraging collective bargaining and, thus, allowing union-represented groups of employees to choose their own bargaining priorities. This is frequently the basis underlying permissible employer differentiation. *See e.g., Firestone Synthetic Fibers Co. v. N.L.R.B.*, 374 F.2d 211, 216-17 (4th Cir. 1967); *Intermountain Equipment Co. v. N.L.R.B., supra*, 239 F.2d 480, 482-83; *N.L.R.B. v. Nash-Finch Co.*, 211 F.2d 622, 625-27 (8th Cir. 1954). *See also Dallas Morning News*, 285 NLRB 807, 808 (1987) ("union simply valued other benefits more highly and traded off its sick-pay proposals for benefits in other areas"). It is lawful for a State to do the same.

It is entirely puzzling, indeed, to see how it could be an infringement of an employee's right to engage in collective activity for the State to remit economic issues, such as the one implicated here, to the collective bargaining process. Livadas says she wanted to bargain -- California told her union to seek what she wanted through the bargaining process.

Livadas and her *amici* incorrectly argue that the Section 229 exception *precludes* the pursuit of bargaining alternatives and confined her to the "Hobson's choice" between abandoning union-adherence or forever foregoing late wage payment penalties. This is incorrect.

There clearly are several ways Livadas' union could have negotiated for provisions which would have avoided this "dilemma."[17]

First, the union could have sought comparable (or even more exacting) provisions requiring immediate delivery of final paychecks and penalties for a failure to comply; such provisions would have been enforceable under the existing arbitration procedure. Second, her union could have proposed a contractual provision expressly conferring the right to enforce all or certain types of wage claims through the Labor Commissioner's procedures. *See e.g. Waters v. San Dimas Ready Mix Concrete*, 222 Cal.App.2d 380, 383, 35 Cal.Rptr. 215 (1963) (CBA gave option to employee to pursue claim either through arbitration or the Labor Commissioner). Third, to the extent that the existing procedure did not encompass claims of this sort, Livadas' union could have sought to modify the arbitration clause to include claims for statutory late wage payment penalties. *See e.g. Int. Bhd. of Teamsters, Local Union No. 117 v. Washington Employers, Inc.*, 557 F.2d 1345, 1350 (9th Cir. 1977) (rejecting as "frivolous" an employer's contention that an arbitrator lacked power to apply a wage penalty statute where the employer and union had agreed to arbitrate the statutory claim).[18]

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[17] It is especially strange that Livadas now totally ignores such alternatives given her concession in the Petition for *Certiorari*, p. 8, that her union could have "bargain[ed] to replace the lost statutory benefits."

[18] For present purposes, it suffices to establish, as we have, that there is no California or federal law restriction on the power of unions and employers to agree to arbitrate California statutory wage claims. For this reason, there is no need to determine the extent, if any, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), survives *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *See e.g., Hirras v. Nat. R.R. Passenger Corp.*, 10 F.3d 1142 (5th Cir. 1994) (Title VII claims arbitrable under CBA arbitration clause subject to Railway Labor Act); *Austin v. Owens-Brockway Glass Container, Inc.*, 1994 U.S. Dist. Lexis 846 (W.D.Va. 1994) (ADA claim subject to CBA arbitration procedure). As to the scope of CBA arbitration

(continued...)

Livadas' union evidently did not pursue any of these options and, if it did, it chose to accept other wages and benefits in lieu of these. That is the very nature of collective bargaining. State law exemptions, of which Livadas and her *amici* complain, allow for flexibility so that unions and employers may order their priorities to best fit their specific industry, business and employee needs.

Instead of anticipating the issue and dealing with it in a timely fashion through the bargaining process, Livadas turned to the federal courts claiming "discrimination." This position is misguided.

Section 229 was not designed to punish employees for choosing to be represented by unions, nor does it convey the remotest implication of any state disapproval of the collective bargaining process. To the contrary, "[a] primary aim of the California Legislature in adopting section 229 was to recognize the importance of both collective bargaining agreements and arbitration." *Plumbing, Heating etc. Council v. Howard, supra*, 53 Cal.App.3d 828, 833.

Livadas' attack and the arguments of her *amici* also are at fundamental odds with *Fort Halifax*, a case involving a state-imposed requirement for the payment of severance pay which authorized employers to negotiate less favorable severance pay terms. The statutory exemption in *Fort Halifax* was found to "strengthen the case that the statute works no intrusion on collective bargaining." 482 U.S. at 22. Adopting the *amicus* argument urged by the AFL-CIO, the Court determined that it was wholly appropriate for the State to "balance the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment." *Id.*

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[18](...continued)
clauses, *see also, e.g., Dryer v. Los Angeles Rams*, 40 Cal.3d 406, 418 n. 12, 220 Cal.Rptr. 807, 709 P.2d 826 (1985) (state law tort claims fall within scope of CBA arbitration clause); *Papadopolous v. Sheraton Park Hotel*, 410 F.Supp. 217 (D.D.C. 1976) (claims under D.C. Wage Law arbitrable under CBA).

The conclusion that there has been no infringement of Section 7 rights becomes even easier when one focuses on the precise issue raised by this case -- whether the State's differential treatment, which protects individual non-represented employees by not allowing them to negotiate less favorable labor standards with their employers, is unlawful discrimination against union-represented employees. Any hint of anti-union discrimination which could be perceived by employees when employers treat non-represented employees economically more favorably than their union-represented counterparts does not conceivably come into play when the State draws distinctions, such as it did in Labor Code Section 229, to protect the "individual, non-union and otherwise unprotected wage earner . . ." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 131 (1973).

Thus, whether or not analogous employer conduct would be unlawful (which it is not), CBA exceptions, such as these adopted by California and many sister States, unquestionably are lawful. This is true whether they broadly distinguish between non-union represented and represented employees or they limit the exemption to subgroups among the represented, such as employees covered by CBAs with or without arbitration procedures and/or specified substantive conditions.[19] Such legislative classifications are clearly permissible where, as here, the union-represented employees automatically receive the State labor standard unless and until they enter into a CBA which

[19] Invoking the so-called "sex plus" theory of employment discrimination under Title VII, *see Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), the United States argues that the Labor Commissioner's exclusion of only a subclass of the "protected group" is as illegal as exclusion of the entire class. [United States Brief, p. 23.] This argument is entirely irrelevant in light of our showing that it would have been perfectly lawful for the State to have expressly excluded all CBA-covered employees (or, indeed, all union-represented employees) directly from the substantive scope of Sections 201 and 203. (We also note that Title VII rulings have little bearing with respect to NLRA jurisprudence.)

does not provide the benefit. Classifications would be equally valid even if employees do not receive the benefit unless and until it is bargained for and obtained.

C. The AFL-CIO Position is Based Upon Erroneous Assumptions and Invalid Legal Arguments

Given these conclusions, there can be no possible validity to the fence-straddling position taken by the AFL-CIO. In what appears at first glance to be a presentation of remarkable candor, the AFL-CIO suggests that *some* State collective bargaining exceptions might be held to "facilitate[] collective bargaining rather than punish[], its exercise." [AFL-CIO Brief, p. 29 n. 16.]

Although *amici* appreciate the concession as far as it goes, we still take exception to the balance of the AFL-CIO's position. The AFL-CIO's suggestion that California's "hands off" policy in this case is illegal because it "simply excludes" union-represented employees, rather than permits them "to opt out of California's wage laws in preference to some other collectively bargained arrangement," AFL-CIO Brief, p. 29, is not even based on a correct factual premise. California law, like the Maine statute considered in *Fort Halifax*, extends State law substantive and procedural rights which remain applicable unless and until the employees enter into a CBA which in one way or the other varies or eliminates those rights.[20] Livadas and similarly situated employees have multiple bargaining options,

[20] Even more difficult to accept is the AFL-CIO's additional suggestion that unions may be permitted to bargain away rights only when "they bargain for similar but not necessarily identical provisions." [AFL-CIO Brief, p. 29 n. 16.] In its *Fort Halifax* brief, the AFL-CIO contemplated that unions could "give up" state law rights "for something else," just as they may entirely "waive" employee individual statutory rights under the NLRA. [*See* p. 2 & n. 1 above.] It cannot be disputed that unions may entirely waive economic benefits and NLRA statutory rights. [*See* pp. 23-25 below & Addendum A, pp. A-4--A-5.] Indeed, certain other federal statutes contemplate the possibility of a complete waiver of benefits. [*See* pp. 25-27 below.]

including negotiating for a "Labor Commissioner" exception to an arbitration clause. [*See* p. 14 above.]

In any event, even if no bargaining alternative were available to permit union-represented employees to secure enforcement of State law rights by the Labor Commissioner, there still would be no basis for complaint. Unions would still be perfectly able to negotiate with employers for identical substantive and remedial rights. The burden on the union of starting with no guaranteed rights and having to secure the rights through bargaining -- even though such rights are afforded to the non-union-represented -- is functionally indistinguishable from the many cases in which similar employer impositions were held to be totally compatible with Sections 7 and 8 of the NLRA. [*See* Addendum A, pp. A-1--A-4.]

D. The Only Case Which Even Arguably Supports Livadas' Position is Distinguishable, Erroneous and Contrary to Prior Precedent Within the Same Circuit

In support of the *certiorari* petition, Livadas and the United States vigorously contended that their position as to the alleged illegality of California's "hands off" policy was supported by the Eighth Circuit decision in *United Steelworkers v. Johnson*, 830 F.2d 924 (1987) *(en banc)* and the Fourth Circuit decision in *Rum Creek Coal Sales, Inc. v. Caperton*, 971 F.2d 1148 (1992). *Certiorari* having been granted, they no longer rely on these cases.[21] And, for good reason. These decisions have nothing whatsoever to do with the essential issue in this case.[22]

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[21] The United States now relies upon *Johnson* and *Rum Creek Coal* only for the distinct proposition -- with which *amici* do not disagree -- that a statute valid on its face is susceptible to being interpreted and applied in a manner contrary to federal law. [United States Brief, pp. 24-25.]

[22] The discrimination which the Eighth Circuit majority in *Johnson* found to have been committed by the State of South Dakota was disparate treatment (continued...)

The only decision which is of any potential assistance to Livadas and her *amici* was not cited in any of their briefs. *McCollum v. Roberts*, 1994 U.S.App. Lexis 3537 (9th Cir. 1994), held that a CBA exception to an Oregon labor standard requiring paid rest periods was an illegal infringement of union-represented employees' NLRA rights and therefore was preempted under the "*Machinists* preemption doctrine."

McCollum aptly observed that the conclusion that "Oregon was not required to exempt union employees from benefits does not ineluctably mean that Oregon's voluntary choice to do so was unlawful." The Ninth Circuit panel further opined that "[i]f Oregon's exclusion of unionized employees serves some other legitimate State function, then an argument can be made that its regulations could be justified." *McCollum*, however, struck down the CBA exception on the ground that the defendant Oregon Labor Commissioner had "proffered no reason for the exclusion" other than an "incorrect assumption" that it was required by federal preemption principles.

McCollum is readily distinguishable on the ground that the California exemptions are based upon unquestionably valid state considerations of promoting collective bargaining and allowing for employee self-determination, interests fully legitimized by the Court

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[22](...continued)
between union *members* and *non-members* who were part of the same bargaining unit. 830 F.2d at 929. This is precisely the type of discrimination which was condemned as highly destructive of Section 7 rights by the Court in *Radio Officers' Union* and was distinguished in the many cases collected in the Addendum. The lack of any conflict between this case and *Johnson* is more than amply confirmed by the Eight Circuit's decision in *Omaha Typographical Union No. 190 v. N.L.R.B.*, 545 F.2d 1138, 1144 (8th Cir. 1976), which distinguished the Court's decision in *Great Dane* in holding that the "[d]isparate treatment of members of different units provides no inference of discrimination." *Rum Creek Coal* is even more remote. It had nothing to do with any alleged interference with employee Section 7 rights.

in *Fort Halifax* in accepting the AFL-CIO's *amicus* argument. *See also* pp. 13-17 above. The disparate effect of these statutory exceptions is not the result of discrimination against union-represented employees, but rather is the result of a legitimate legislative judgment to protect individual, unrepresented and legally perceived weaker employees. *Ware, supra*, 414 U.S. at 131.

But even more fundamentally, *McCollum* is wrong.[23] It provided no basis for its legal conclusion -- other than to approvingly cite the Ninth Circuit dissent in the present case -- as to how or why Oregon's distinguishing between non-represented and represented employees could be illegal under the NLRA.[24] As demonstrated above, 50 years of NLRA precedent establishes that there was negligible, if any, adverse affect on employee Section 7 rights.[25]

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[23] *McCollum* distinguished the Ninth Circuit's decision in *Babler Bros., Inc. v. Roberts*, 995 F.2d 911 (1993), on the purported ground that the State in *Babler* "had a proprietary interest in enforcing working conditions on its own construction projects." A reading of *Babler*, however, shows that the "proprietary interest" rationale was in no way related to its Sections 7 and 8 analysis. 995 F.2d at 914-15. Furthermore, *amici* seriously doubt that the "proprietary interest" rationale of *Building & Construction Trades Council, supra*, 113 S.Ct. 1190, extends to permitting otherwise proscribed discrimination by the State against individual employees. Thus, *McCollum* probably is irreconcilable with *Babler*. *See also Christoffel v. E.F. Hutton & Co., Inc.*, 588 F.2d 665, 667 (9th Cir. 1978) (Ninth Circuit panels are bound by earlier panel decisions).

[24] The *McCollum* panel relied on "*Machinists* preemption," an approach correctly disavowed by the AFL-CIO and the United States. [See p. 6 above.]

[25] *Amici* further believe that contrary to *McCollum*, but consistent with the Ninth Circuit majority in this case, a State's attempt to avoid potential federal preemption of overregulation activity is a legitimizing basis for a CBA exception irrespective of how well the State divines federal preemption requirements. *See e.g., Corporation of Presiding Bishop v. Amos*, 483 U.S. (continued...)

II. THE NLRA AND OTHER FEDERAL STATUTES PERMIT UNIONS, BUT NOT INDIVIDUALS, TO BARGAIN AWAY INDIVIDUAL EMPLOYEE STATUTORY RIGHTS

Fort Halifax leaves no doubt that a State *may* impose a minimum labor standard and, at the same time, allow for employer-employee negotiation for lesser terms. The issues of whether or not a particular standard is "waivable" and, if so, the conditions for "waiver" are, in the first instance, issues of State law.[26] Many

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[25](...continued)
327, 335-36 (1987) (religious employer exemption to Title VII was based on valid legislative purpose of avoiding potential unconstitutional overregulation). At the very least, the State must be allowed "reasonable" breathing room. *See* AFL-CIO Brief, p. 28; *Texaco, Inc., supra*, 285 NLRB 241, 246 (claim of discrimination against employer will be rejected if employer's position was based on "reasonable" and "arguably correct" contract interpretation). And in determining the "reasonableness" of California's 1959 legislative judgment, it would be inappropriate to rely on the Court's *subsequent* decision in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), in light of the Court's acknowledgement that there was "plausibility" to the preemption argument which it rejected, based on "dicta in some prior Court decisions." *Id.* 752-53. Also, it should be noted that the State's analysis in this case focused upon Section 203, the statutory remedy provision. *See Brown v. Hotel & Restaurant Employees*, 468 U.S. 491, 510 (1984) ("a sanction for noncompliance with an otherwise valid state regulation must, for preemption purposes, be assessed independently in terms of its potential conflict with the federal enactment"). Everything else said, *amici* also believe that application of Sections 201 and/or 203 in fact would have been preempted -- an issue which need not, and should not be decided in this case.

[26] In *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 409 n.9 (1988), the Court noted that it is an open question whether State law bars to waiver are subject to Section 301 preemption. That question obviously need not be addressed in this case.

provisions, as noted at pp. 28-30 below, contain express, unambiguous conditions for "waiver."[27] In other situations, ambiguous statutory "waiver" language has been subject to interpretation. *See, e.g., Porter v. Quillin,* 123 Cal.App.3d 869, 876, 177 Cal.Rptr. 45 (1981) (state policy favoring collective bargaining supports conclusion that union may vary labor standard). "Waiver" may be permitted even when the relevant statute itself is wholly silent. *See, e.g., American Broadcasting Companies, Inc.*, 61 N.Y.2d 244, 461 N.E.2d 856, 473 N.Y.S.2d 370 (1984) (upholding CBA waiver of state law meal break requirement).

In this case, there can be no dispute as to the propriety of "waiver" as a matter of California law, the nature of the State law conditions for "waiver" and the fact that these conditions were found by the Labor Commissioner to have been satisfied. The only issue before the Court is whether the State's "waiver" conditions illegally discriminate against union-represented employees by permitting them to "waive" the labor standards, but not granting analogous rights to non-represented employees. The answer, as already demonstrated, is that "disparate treatment" designed to protect legally presumed powerless, non-represented employees cannot be transmuted into claims of anti-union discrimination.

There are other reasons for reaching the same conclusion. It is settled that a federal labor preemption challenge to an aspect of State law generally will not succeed if the NLRA and other federal statutes have similar legal effect or otherwise implicitly authorize the challenged State action. *See, e.g., Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724, 755 (1985); *Brown v. Hotel &*

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[27] *See also Fort Halifax, supra*, 482 U.S. at 4 n.1 (statute provided exception if "the employee is covered by an express contract providing for severance pay"). It was this State law standard to which the AFL-CIO referred in its *Fort Halifax* brief. [*See* p. 2 above.] The AFL-CIO interpreted it to provide that any waiver "must be express and intentional."

Restaurant Employees, 468 U.S. 491, 505-509 (1984). Because the NLRA and other federal statutes provide for the exact type of differential treatment of which Livadas and her *amici* complain, all other considerations aside, Livadas' claim has no possible merit.

A. The NLRA Waiver Doctrine Authorizes the Differential Treatment of Which Livadas Complains

As the AFL-CIO argued in *Fort Halifax*, *see* p. 2 above, but now overlooks, the NLRA "waiver" doctrine is an extremely relevant analogue to State laws which provide that employees may negotiate away "minimum labor standards." Most recently approved by the Court in *Metropolitan Edison Co. v. N.L.R.B., supra*, 460 U.S. 693, this rule provides that unions, but not individual employees (whether or not union-represented), may waive their constituents' individual statutorily-protected rights, including economic rights, as part of the bargaining process. *See also, e.g., Northern Pacific Sealcoating*, 309 NLRB 759 (1992) ("parties to collective bargaining agreements may waive certain of their rights, including some fundamental statutory rights").

This rule of flexibility, among other things, allows a union to "bargain away" statutory protections "to secure gains it considers of more value to its members." 460 U.S. at 707. To our knowledge, it has *never* even been argued that this rule constitutes "anti-union" discrimination simply because individual, non-union-represented employees do not enjoy the same negotiating flexibility.

Of particular significance to our analysis are the decisions which confirm that unions may waive individual employee rights under the NLRA to receive economic benefits on a non-discriminatory basis. "Waiver of an employee's statutorily protected right to receive benefits free of discrimination imposes no constraints on the employee's ability to choose a representative. It is directly analogous to a union's bargaining away its member's economic rights." *Energy Cooperative, Inc.*, 290 NLRB 635, 636 (1988). *Accord, e.g. Gulf Oil Co.*, 290 NLRB 1158, 1161 (1988). Also highly germane are the

decisions which uphold the power of unions to bargain away the right of access of their members to the NLRB's processes with respect to the vindication of fundamental NLRA rights. *See Plumbers and Pipefitters Local U. No. 520 v. N.L.R.B.*, 955 F.2d 744, 751-52, 756 (D.C. Cir.), *cert. denied*, 113 S.Ct. 61 (1992); *Mahon v. N.L.R.B.*, 808 F.2d 1342, 1345 (9th Cir. 1987). *See also, e.g., Northern Pacific Sealcoating, supra*, 309 NLRB 759, 760 (unions and employers may contractually forego access to Board's representational rights machinery).[28]

It is entirely irrelevant whether the State's conditions for "waiver" correspond to the "clear and unmistakable" waiver standard which governs the NLRA "waiver" analysis.[29] *Metropolitan Edison*

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[28] There is a distinct line of decisions in which the NLRB provides for "deferral" of its own proceedings pending arbitration pursuant to collectively-bargained procedures. *See Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984) ("*Collyer*" deferral applies to claimed violations of individual employee rights). *Accord, N.L.R.B. v. City Disposal Systems, Inc.*, 465 U.S. 822, 838-39 (1984); *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 16-17 (1974); *Hammontree v. N.L.R.B.*, 925 F.2d 1486 (D.C. Cir. 1991) (*en banc*). Although the California policy at issue in this case is not strictly a "deferral" policy, the *Collyer* doctrine does provide further indicia that the NLRA permits states to adopt "hands off" policies applicable only with respect to employees who work under collective bargaining agreements with grievance and arbitration procedures. It is not "anti-union discrimination" for the States to decline to extend the same "hands off" enforcement policies to claims brought by individual, non-union-represented employees.

[29] In fact, the State's waiver conditions would easily satisfy the federal standard. To constitute a "waiver" under federal law, there is no need to demonstrate that the matter was expressly discussed between employer and union or even that union fully understood the consequences of its actions. *See e.g. American Freight System, Inc. v. N.L.R.B.*, 722 F.2d 828, 832 (D.C. Cir. 1983) (any statutory right under NLRA to refuse to work based on safety concerns was "waived" simply by the existence of a contrary provision in the CBA); *Northern Pacific Sealcoating, supra*, 309 NLRB 759 (continued...)

Co., supra, 460 U.S. at 708. What is relevant is that the NLRA authorizes the same type of "disparate treatment" with respect to unions bargaining away employee rights -- both substantive economic rights and the opportunity to pursue claims through public administrative agencies -- which Livadas and her *amici* decry as "anti-union discrimination" on the part of the State of California.

B. Other Federal Employment Statutes Authorize Similar Differential Treatment

There are a number of federal statutes which contain exceptions analogous to the challenged State CBA exceptions. When these other federal statutes are read in conjunction with the NLRA "waiver" cases, there can be no lingering argument as to the validity of the State CBA exceptions.

Fair Labor Standards Act: The federal minimum wage and overtime law -- a paradigm example of a "minimal employment standard" -- provides in several places that federal standards may be varied downward, or eliminated entirely, by employer-employee agreement, including employer-union agreement. Section 7(b)(1) & (2), 29 U.S.C. § 207(b)(1) and (2), for example, wholly exempt

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[29](...continued)
(waiver may be effected "by contractual provision or by conduct"); *Gem City Ready Mix Co.*, 270 NLRB 1260 & 1261 (1984) (waivers of rights "need not . . . be evidenced by an express statement of waiver;" "a waiver of what constitutes a legally protected right is not invalidated on the basis that the waiving party . . . may not have realized that the right waived was otherwise protected by the Act"); *Gulf Oil Co., supra*, 290 NLRB 1158, 1161 ("clear and unmistakable" waiver of NLRA discrimination claims found, in part, because agreement provided that it was to "settle all matters negotiated between the parties"). *See also Chicago Tribune Co. v. N.L.R.B.*, 974 F.2d 933, 936-37 (7th Cir. 1992); *Dept. of Navy, Marine Corp Logistics Base*, 962 F.2d 48, 60 (D.C. Cir. 1992). Furthermore, "[j]ust as ignorance of the law does not excuse conduct which violates it, ignorance of the law does not revoke conduct which legitimizes what might *otherwise* violate the law." *Gem City, supra*, 270 NLRB 1260 (emphasis in original).

employers from weekly overtime obligations in certain circumstances applicable *only* when employees are employed "in pursuance of an agreement, made as a result of collective bargaining . . ." Similarly, under the Portal-to-Portal Act amendments, 29 U.S.C. § 203(o), certain time otherwise treated as work time under the FLSA is non-compensable if so provided by a CBA.[30]

Service Contract Act: This statute mandates that employers furnishing services to the United States provide wages and fringe benefits in accordance with "prevailing rate" determinations made by the Secretary of Labor, but permits the employers to pay lesser wages and fringe benefits, or no benefits at all, "where a collective bargaining agreement covers any such service employees." 41 U.S.C. § 351(a)(1) & (2).

Employee Retirement Income Security Act: The ERISA anti-discrimination provisions governing tax qualification considerations exclude employees covered by collective bargaining agreements "if there is evidence that retirement benefits were the subject of good faith bargaining."[31] 26 U.S.C. § 410(b)(3)(A). *See Lynn-Edwards Corp.*, 290 NLRB 202, 204 & n.14 (1988) (in finding that retirement plan with somewhat similar exclusion did not violate § 8(a)(1) of the

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[30] Section 7(o), 29 U.S.C. § 207(o), is also similar, although not quite as directly analogous. *See Moreau v. Klevenhagen*, 113 S.Ct. 1905 (1993) (overtime pay of public employees may be replaced with "comp time" pursuant to employer-employee agreement; where employees have an authorized bargaining representative, only the union -- and not individual employees -- has the power to contract away the right to overtime wages). Section 7(f), 29 U.S.C. § 207(f) permits exceptions to weekly overtime pay obligations which come into play either based on individual agreements with non-represented employees or collective agreements with union-represented employees.

[31] Of course, benefits would be deemed to have been the subject of bargaining if the union decided to forego or "waive" its right to bargain. *See e.g., Firestone Synthetic Fibers Co. v. N.L.R.B., supra* 374 F.2d 211, 216-17 (union never requested inclusion in pension plan).

NLRA, the Board "note[d] the similarity" between the plan and 26 U.S.C. § 410(b)(3)(A)).[32] Provisions comparable to § 410 include 26 U.S.C. §§ 401(i), 416(i)(4), 419A(e)(1) & 505(a)(2).

Sherman Antitrust Act: Pursuant to the non-statutory labor antitrust exemption, union-represented employees are denied antitrust protections with respect to employer control of wages, hours and working conditions which are extended to non-union-represented individuals. *See, e.g., Powell v. National Football League*, 930 F.2d 1293, 1302-03 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) ("the nonstatutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship from challenges under the antitrust laws").

III. LIVADAS' ARGUMENT THREATENS NUMEROUS OTHER COLLECTIVE BARGAINING EXCEPTIONS TO STATE LABOR REGULATIONS

As the prior discussion suggests, the importance of this case far transcends the specific dispute in question. If Livadas successfully argues that the State cannot take a "hands off" policy with respect to her claim for late final paycheck penalties, far greater consequences could follow. *Amici* wish to advise the Court of the many laws in California and throughout the nation which may be affected. We also note that the wide prevalence of these regulatory exceptions further negates any implication of governmental anti-union discrimination.

A. California Provides a Number of Express Collective Bargaining Exceptions to State Labor Standards

Extremely important examples of collective bargaining exceptions to state labor standards -- with many millions of dollars

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[32] The specific employee benefit plan at issue in *Lynn-Edwards* provided that union-represented employees would be excluded only if there had been bargaining *and* the CBA granted alternative retirement benefits. This latter limitation was not one imposed by § 410(b)(3)(A).

potentially at stake -- can be found in the administrative orders of a California agency, the Industrial Welfare Commission ("IWC"), which specify requirements for payment of daily overtime penalties. For example, employers in the broadcasting and motion picture industries have significantly relied on provisions which allow them to enter into CBAs which do not require payment of double time for work in excess of twelve hours in a day, as the IWC orders otherwise would require.[33]

Similarly, Calif. Labor Code § 227.3 provides that all unused vested vacation time must be paid to terminated employees and has been judicially interpreted rather stringently to require employers to pay prorated vacation pay for employees irrespective of vesting requirements. These rules, however, are subject to the important qualification: "*Unless otherwise provided by a collective bargaining agreement . . .*" (emphasis added).

Express CBA exceptions likewise are provided to statutes which specify the frequency of wage payments, Labor Code §§ 204, 204.1 & 204.2, and of work hours and rest days, § 504.

B. At Least 17 Other States and the District of Columbia Provide Similar Exceptions

California is not unique in remitting some labor standards issues to the collective bargaining process. As enumerated in

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[33] IWC Wage Orders 11-80 and 12-80, applicable to the broadcasting and motion picture industries respectively, provide exceptions to the overtime requirements for "any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee at not less than one dollar ($1.00) more than the minimum wage." *See* Title 8, Calif. Code of Reg. § 11110(3)(F) (broadcasting) & § 11120(3)(H) (motion picture). (The overtime obligations appear in § 11110(3)(A) & § 11120(3)(A).) Similar provisions apply with respect to the other businesses covered by the IWC orders (which constitute almost all California private sector employers).

Addendum B, we have identified examples of collective bargaining exceptions in the laws of more than one-third of the States.[34]

Several States provide CBA exceptions with respect to provisions specifying the time for making wage payments, including payments to terminated employees. *See, e.g.*, D.C. Code Ann. § 36-103(1) (exception to requirement of paying terminated employee within one working day following termination); Okla. Stat. tit. 40, § 165.3 (wage payment upon termination); Or. Rev. Stat. § 652.140 (payments upon termination); Vt. Stat. Ann. tit. 21, 342(b) (timing of weekly wage payments).

As other important examples, States other than California provide CBA exceptions to state overtime requirements: *See, e.g.*, Alaska Stat. § 23.1060(d)(14) (exception to overtime provisions for employees under flexible work hour plans in a CBA); Nev. Rev. Stat. § 608.018(2)(f) (overtime pay); Or. Rev. Stat. § 279.334 (daily overtime pay for employees of contractors on public projects).[35]

Meal and rest break provisions also frequently are subject to CBA exceptions: *See, e.g.*, Conn. Gen. Stat. § 31-51ii (CBA exception to required 30-minute meal break for 7-1/2 hour work day); Illinois C.S. 140/3 (meal breaks); Mass. Gen. L. ch. 149, § 101 (meal breaks); Minn. Stat. §§ 177.253 & 177.254 (meal and rest breaks); Or. Admin. R. 839-20-100(1) (meal and rest periods and other working conditions).[36]

Finally, at least two States provide CBA exceptions with respect to mandated insurance provisions similar to those upheld in

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[34] *Amici* do not represent this listing to be exhaustive.

[35] § 279.334 is the provision correctly upheld by the Ninth Circuit in *Babler, supra*, 995 F.2d 911. *See* p. 20 n. 23 above.

[36] Rule 839-20-100(1) is the provision incorrectly struck down by the Ninth Circuit in *McCollum, supra*, 1994 U.S.App. Lexis 3537. *See* pp. 19-20 above.

Metropolitan Life, supra, 471 U.S. 724. *See* Wash. Rev. Code §§ 48.44.310 & 48.44.340 (required coverage of chiropractic and mental health care); Md. Ann. Code art. 48A, § 490L (reimbursements and copayments for prescriptions).

If CBA exceptions in California and elsewhere were ineffective, there could be substantial, unanticipated costs to many employers, which costs might have been alleviated through the negotiation of different arrangements in other aspects of the CBAs. Considerations of fairness aside, we have established that these CBA exceptions are designed to enhance, and not to interfere with, the collective bargaining process. They do not constitute anti-union discrimination.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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March 14, 1994

ADDENDUM A

NLRA Decisions Holding that Differential Treatment Between Union-Represented and Non-Union Represented Employee Groups Was Not Unlawful

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NLRA Decisions Holding that Differential Treatment Between Union-Represented and Non-Union Represented Employee Groups Was Not Unlawful

I. New Benefit Extended to Non-Bargaining Unit Employees, but not Extended to the Union-Represented Group

A. During Life of Existing CBA

Intermountain Equipment Co. v. N.L.R.B., 239 F.2d 480, 482-83 (9th Cir. 1956) (employer did not violate § 8(a)(3) where it granted sick leave and bonuses only to non-represented employees, particularly given that union-represented employees had bargained for and obtained other benefits which the non-unit employees were not given).

Hemet Casting Co., 260 NLRB 437, 443 (1982) (no violation of § 8(a)(1) where employer granted new fringe benefits to non-represented employees, but not to bargaining unit employees).

Empire Pacific Industries, Inc., 257 NLRB 1425, 1426 (1981) (no violation of § 8(a)(1) & (3) where employer granted cost-of-living wage increases only to non-represented employees).

Sun Oil Co. of Penn., 245 NLRB 59, 66-67 (1979) (no § 8(a)(1) or (3) violation where employer selectively granted severance pay; employer may "hold the line and preserve for tactical reasons benefits or concessions in advance of collective bargaining").

Bancroft-Whitney Co. Inc., 214 NLRB 57, 61 (1974) (no § 8(a)(3) violation where employer granted wage dividends only to non-represented employees).

Sundstrand Castings Co., 209 NLRB 414, 427 (1974) (not illegal discrimination for employer to "grant [severance] benefits to unorganized employees and withhold the same benefits from organized employees").

B.F. Goodrich Co., 195 NLRB 914, 915 (1972) (no § 8(a)(3) violation because "the granting of new profit-sharing benefits to unorganized employees but not to represented employees is not, standing alone, prohibited discrimination").

Meredith Corp., 194 NLRB 588, 590-93 (1971) (employer did not violate § 8(a)(1) or (3) by paying only non-represented employees for time not worked due to snow storm closure).

New Orleans Bd. of Trade, 152 NLRB 1258, 1264-65 (1965) (no § 8(a)(1) violation where employer gave bonus to non-represented employees, but withheld bonus from union-represented group).

Central States Petroleum Union, 127 NLRB 223, 228-29 (1960) (no § 8(a)(3) violation where members of different bargaining units were treated differently for purposes of layoff and recall).

Speidel Corp., 120 NLRB 733, 734-38 (1958) (no violation of § 8(a)(1) and (3) where employer "disparate treatment" consisted of giving Easter bonus to non-represented employees which it did not pay to union-represented employees).

Anheuser-Busch, Inc., 112 NLRB 686, 690-91 (1955) (no § 8(a)(1) or (3) violation where employer granted pay for day not worked to members of one bargaining unit, but not to another; no inference of unlawful intent can "be drawn from the disparity of treatment alone").

B. Before First CBA or Between CBAs

South Shore Hospital v. N.L.R.B., 630 F.2d 40, 45 (1st Cir. 1980) ("As the Board points out, absent unlawful motive, an employer, during the course of negotiations, does not violate the Act by withholding wage increases from represented employees") (*dictum*).

Omaha Typographical Union No. 190 v. N.L.R.B., 545 F.2d 1138, 1143-44 (8th Cir. 1976) (no § 8(a)(1) violation where bonuses were paid to non-unit employees who worked during strike, but were withheld both to striking and non-striking members of the bargaining unit; "[d]isparate treatment of members of different units provides no inference of discrimination").

Chevron Oil Co., Standard Oil Co. of Texas v. N.L.R.B., 442 F.2d 1067, 1074 (5th Cir. 1971) (employer did not violate § 8(a)(1) or (3) because "[i]t has long been an established [NLRB] principle that . . . an employer is privileged to withhold from organized employees wage increases granted to unorganized employees or to condition their grant upon final contract settlement").

N.L.R.B. v. Appalachian Electric Power Co., 140 F.2d 217, 219 (4th Cir. 1944) (no § 8(a)(1) violation where employer withheld wage increases from union-represented group on ground that the "terms and extent of these increases would necessarily depend upon the outcome of the subsequent collective bargaining").

Harvard Folding Box Co., Inc., 273 NLRB 841, 851-52 (1984) (no § 8(a)(1) or (3) violation where employer continued to pay the full amount of insurance premiums for its non-unit employees while requiring unit employees to pay part of those premiums).

Winn-Dixie Raleigh, Inc., 267 NLRB 231, 236 (1983) (not a violation of § 8(a)(3) where employer granted annual wage increase only to non-represented employees).

United States Postal Service, 261 NLRB 505, 506-507, 511 (1982) (no § 8(a)(3) violation where employer granted wage increase only to its non-represented employees because, "[o]nce the Union was certified, the [employees] could not expect to receive all those random increases while the Union was also bargaining with [the employer] over a new contract").

Ithaca Journal-News, Inc., 259 NLRB 394, 396 (1981) (not a violation of § 8(a)(1) & (3) where employer granted increase in mileage allowances to only non-union-represented employees).

Shell Oil Co., 77 NLRB 1306, 1309-10 (1948) (no § 8(a)(1) or (3) violation because "an employer is privileged to give wage increases to his unorganized employees, at a time when his other employees are seeking to bargain through a statutory representative").

II. Pre-Existing Benefit Reduced, Eliminated, or Not Included in CBA

N.L.R.B. v. Henry Vogt Machine Co., 718 F.2d 802, 809 (6th Cir. 1983) (no violation of § 8(a)(1) where employer withdrew company-subsidized lunchroom privileges from employees who joined bargaining unit).

Firestone Synthetic Fibers Co. v. N.L.R.B., 374 F.2d 211, 216-17 (4th Cir. 1967) (no § 8(a)(1) violation where employer's benefit plans distinguished between union-represented and non-represented employees, the record showing that "the Union never requested the major medical and pension plans available to unrepresented salaried employees be made available to unionized hourly-paid employees, choosing instead to bargain for other benefits").

N.L.R.B. v. Nash-Finch Co., 211 F.2d 622, 625-27 (8th Cir. 1954) (not a violation of § 8(a)(1) & (3) where employer did not continue to pay bonus and insurance benefits after entering into CBA which did not require it to do so, even though non-unit employees

continued to receive the economic benefits and union never expressly waived the benefits).

KEZI, Inc., 300 NLRB 594, 595 (1990) (no § 8(a)(1) violation where 401(K) plan excluded "employees who are members of a collective bargaining unit with whom retirement benefits were the subject of good-faith bargaining").

Lynn-Edwards Corp., 290 NLRB 202, 203-04 & n. 14 (1988) (employer did not violate § 8(a)(1) by maintaining ESOP retirement plan which excluded employees covered by collective bargaining agreement).

Dallas Morning News, 285 NLRB 807, 808-09 (1987) (no § 8(a)(1) violation where non-represented employees had had sick pay plan for a number of years, but union-represented group did not; record showed that "the Union simply valued other benefits more highly and traded off its sick-pay proposals for benefits in other areas").

Handleman Co., 283 NLRB 451, 452 (1987) (not a violation of § 8(a)(1) for employer to maintain ESOP plan which excluded employees covered under any company collective bargaining agreements unless such agreement specifically provided for coverage under the plan).

Sarah Neuman Nursing Home, 270 NLRB 663, 680-81 (1984) (employer did not violate § 8(a)(1) by maintaining profit sharing plan which excluded "any person who is covered under a collective bargaining agreement . . . unless the collective bargaining agreement provides for the inclusion of such person under the plan").

ADDENDUM B

State Statutes, Other than California's, Providing CBA Exceptions to Labor Standards

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State Statutes, Other than California's, Providing CBA Exceptions to Labor Standards

I. CBA Exceptions to Provisions Specifying the Time in which Employer Must Pay Wages or Benefits

A. Timing of Payments to Employees Upon Termination or Resignation

District of Columbia: Employer must pay discharged employee's earned but unpaid wages not later than the working day following the discharge, unless another time is specified in a CBA between the employer and the employee's union. D.C. Code Ann. § 36-103(1).

Employer must pay earned but unpaid wages of an employee who quits or resigns by the next regular pay day, or within seven (7) days from the date of resignation, whichever is earlier. This provision does not apply if another time is specified in the CBA. D.C. Code Ann. § 36-103(2).

Oklahoma: Employer must pay all earned but unpaid wages of an employee who is terminated or resigns at the next regular pay day. This provision does not apply if contrary provisions in a CBA cover the employee. 40 Okl. Stat. tit. 40, § 165.3.

Oregon: Where employment is terminated, all wages earned and unpaid at the time of the discharge become due and payable immediately. This provision is inapplicable where a CBA otherwise provides for payment of wages upon termination. Or. Rev. Stat. § 652.140.

B. Timing of Other Payments

District of Columbia: An employer must pay wages to employees on designated pay days. No more than ten working days may elapse between the end of the pay period covered by the payment and the designated pay day, except where a different period is specified in the CBA. D.C. Code Ann. § 36-103(1).

Vermont: In most cases, an employer must pay wages weekly. Each weekly wage payment must relate to a day not more than six (6) days prior to the date of payment. However, if a collective bargaining agreement so provides, each payment may relate to a day not more than thirteen (13) days prior to the date of payment. Vt. Stat. Ann. tit. 21, § 342(b).

II. CBA Exceptions to Provisions for Maximum Hours or Overtime Pay

Alaska: Overtime premium pay requirements for work in excess of 40 hours per week or 8 hours per day do not apply to work performed by employees under flexible work hour plans which are part of a CBA. Alaska Stat. § 23.10.060(d)(14).

Montana: A period of eight (8) hours constitutes a day's work in all works and undertakings carried on by employees of any municipal or county government. However, this provision does not apply to firefighters working under a work period established by a CBA. Mont. Code Ann. § 39-4-107.

Overtime compensation requirements do not apply to firefighters working under a work period established in a CBA. Mont. Code Ann. § 39-3-406(2)(s).

Nevada: Employees covered by a CBA that provides other rules for overtime pay are not subject to overtime premium pay requirements for work in excess of 40 hours per week or 8 hours per day. Nev. Rev. Stat. § 608.018(2)(f).

Oregon: Rules regarding maximum hours and overtime premium pay for employees in mills, factories, and manufacturing establishments do not apply to employees who are subject to a CBA which otherwise provides limits on required hours of work and overtime payments. Or. Rev. Stat. § 652.020(4).

Rules regarding overtime premium pay under public contracts for hours worked in excess of 40 per week or 8 per day and for work performed on Saturday and legal holidays do not apply to contracts for public improvements where the contractor-employer is a party to a CBA. Or. Rev. Stat. § 279.334.

Rules promulgated by Labor Commissioner pursuant to his authority to prescribe minimum wages and overtime pay do not apply to individuals employed by the state or political subdivisions thereof if a CBA prescribes rules governing these conditions if employment. Or. Rev. Stat. § 653.261.

III. CBA Exceptions to Provisions Specifying Requirements or Meal or Rest Breaks

Connecticut: Employees must be given a meal break of at least thirty (30) consecutive minutes where the employee works at least 7-1/2 consecutive hours. However, this rule does not alter or impair any contrary provisions in a CBA in effect on July 1, 1990. Conn. Gen. Stat. § 31-51ii.

Illinois: Employees must be given a meal break of at least twenty (20) minutes, beginning no later than five (5) hours after the start of work, where the employee is scheduled to work for 7-1/2 or more continuous hours. However, this requirement does not apply to employees whose meal periods are established through the collective bargaining process. Ill. Stat. ch. 820, § 140/3.

Massachusetts: Employees must be given a minimum of 30 minutes for a meal-time interval when the employee is scheduled to work more than six (6) hours a day. However, the state's Labor Commissioner may exempt factories, work shops, or mechanical

establishments from this rule where an exemption is appropriate due to "special circumstances" affecting such establishments, including the existence of a CBA. Mass. Gen. L. ch. 149, § 101.

Minnesota: Employer must permit each employee who is working eight (8) or more hours sufficient time to eat a meal. Furthermore, employees must be given adequate time in each four (4) consecutive work hours to use the nearest convenient rest room. However, these requirements do not prohibit employers and employees from establishing different meal periods or standards for rest breaks pursuant to a CBA. Minn. Stat. §§ 177.253 & 177.254.

Nevada: Employer must allow 30-minute meal period for a work day of eight (8) hours, and must allow paid 10-minute rest breaks for each four (4) hours worked. However, these requirements do not apply to employees included within the provisions of a CBA. Nev. Rev. Stat. § 608.019.

North Dakota: An employee who works with at least one other employee on a shift that exceeds five (5) hours must be given a minimum 30-minute break, except for employees whose breaks are governed by a CBA. N.D. Admin. Code § 46-02-01-02(5).

Oregon: Employees shall receive meal periods of not less than 30 minutes for each work period of six (6) to eight (8) hours. In addition, employees are entitled to rest periods, without deduction of pay, for every four (4) hours worked. These meal and rest periods and other working conditions requirements are inapplicable to employees covered by a CBA. Or. Admin. R. 839-20-100(1).

IV. CBA Exceptions to Mandated Group Health Care Insurance Policy Provisions

Maryland: Employer-provided health care insurance policies may not establish different reimbursement amounts for pharmaceutical products based on the identity, practicing specialty, or occupation of the prescriber. Nor may the policy impose different co-payments based on whether the insured uses a community

pharmacy or a mail order pharmacy. However, these provisions do not apply to insurance policies issued to an employer pursuant to a CBA. Md. Ann. Code art. 48A, § 490L.

Washington: Group health care insurance policies shall offer coverage for chiropractic care and mental health care on the same basis as any other care. However, these requirements do not apply to group policies entered into in accordance with a CBA. Wash. Rev. Code §§ 48.44.310 & 48.44.340.

V. CBA Exceptions to Provisions Requiring Employers to Allow Employees to Inspect Personnel Files

Alaska: An employee or former employee has the right to inspect his or her personnel file, but the employer may impose reasonable rules and limitations. This requirement does not supersede the terms of a CBA. Alaska Stat. § 23.10.430(b).

Illinois: Employers, on advance request, must permit employees to inspect personnel records. An employee may request two inspection opportunities at reasonable intervals during a calendar year, unless otherwise provided in a CBA. Ill. Stat. ch. 820, § 40/2.

Wisconsin: Employee, upon request, must be permitted to inspect personnel documents. The employer must grant at least two requests per calendar year, unless otherwise provided in a CBA. Wis. Stat. Ann. § 103.13(2).

VI. CBA Exceptions to Other Laws

Arkansas: Nothing in subchapter governing minimum wages shall be deemed to interfere with, impede, or in any way diminish right of employees to bargain collectively with their chosen representatives in order to establish wages or other conditions of work. Ark. Code Ann. § 11-4-205.

Illinois: Where an employee with accrued paid vacation time resigns or is terminated, the monetary equivalent of all earned vacation time shall be paid to the employee at his final rate of pay, unless otherwise provided in a CBA. Ill. Stat. ch. 820, § 115/5.

Kentucky: Law establishes maximum work hours and other working conditions for drivers and chauffeurs. However, these provisions do not apply to employees employed by motor carriers who are covered by a CBA. Ky. Rev. Stat. Ann. § 281.730.

Louisiana: City and parish school boards must provide a minimum of 30 minutes daily planning time to elementary school teachers which shall not result in a lengthened school day. However, this provision does not apply to a school board operating under the terms of a CBA. La. Rev. Stat. Ann. § 17:434.

Montana: Employer must, to provide a safe workplace, purchase, furnish, and require the use of various health and safety devices and safeguards, unless the terms of a CBA provide otherwise. Mont. Code Ann. § 50-71-201.

Statutes governing public finance of public works projects require contractors to pay employees the standard prevailing wage rate, unless the contractor has entered into a CBA covering the work to be performed. Mont. Code Ann. §§ 17-5-1526, 17-5-1527, 18-2-403 & 90-7-302.

North Dakota: In addition to employee's right to recover unpaid wages from employer, employee is entitled to recover interest and penalties. However, this provision does not apply to wage claims arising under the contested application of a CBA. N.D. Cent. Code § 34-14-09.1.